

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

<b>In the Matter of</b>	)	
	)	<b>WT Docket No. 01-309</b>
<b>Section 20.19 of the Commission's Rules</b>	)	
<b>Governing Hearing Aid-Compatible Telephones</b>	)	<b>FCC 08-67</b>

**To: The Secretary**

**COMMENTS REGARDING  
PETITIONS FOR RECONSIDERATION**

**BLANCA TELEPHONE COMPANY  
CTC TELECOM, INC.  
FARMERS CELLULAR TELEPHONE, INC.**

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## Summary

On March 28, 2008, Blanca Telephone Company, Farmers Cellular Telephone, Inc., and CTC Telecom, Inc. timely filed a joint petition for reconsideration of the Commission's February 27, 2008, *Memorandum Opinion and Order* (FCC 08-67). The reconsideration pleading focused upon the unequal manner in which the Commission handled Petitioners' HAC waiver requests compared to the manner in which the Commission handled the HAC waiver requests of other similarly situated carriers. The focus of the instant comments is upon the unequal treatment the Commission accorded to the Petitioners compared to joint parties which filed an *ex parte* objection against Petitioners' separate waiver requests.

Examination of ¶ 6 of the *Memorandum Opinion and Order* (FCC 08-67) shows that the Commission granted the relief requested by the *ex parte* filer. However, that relief should not have been granted because *ex parte* oppositions are not permitted under well established Commission rules and precedent. Joint petitioners are at a complete loss to understand how the Commission could proceed as it did. Moreover, the *ex parte* opposition to joint petitioners' separate waiver requests was untimely and the Commission failed to discuss that the *ex parte* objector failed to establish standing to object to joint petitioners' HAC waiver requests. These matters could not have been reasonably brought to the Commission's attention prior to the release of the *Memorandum Opinion and Order* (FCC 08-67) because not only was the *ex parte* opposition not served upon joint petitioners, the Commission did not issue a public notice or otherwise inform joint petitioners that an *ex parte* objection had been filed. The Commission's handling of the waiver requests was seriously flawed and reconsideration is required.

The referral of Petitioners to the Enforcement Bureau is defective. First, there was no notice that Petitioners could not base a waiver request upon the inability to obtain HAC compliant

handsets from a third party nor that the handsets had to be obtained as of some randomly selected date which had already come and gone. Second, the Enforcement Bureau is applying a base forfeiture approach to HAC compliance cases without the Commission first concluding a rule making proceeding on the point as required by the APA. Moreover, the appellate court has already determined that the Commission may not impose standardized forfeitures without first conducting a rule making proceeding. Third, no Regulatory Flexibility Act analysis has been published by the Commission regarding the impact of the base forfeiture amounts on small businesses. Fourth, the forfeitures being assessed by the Enforcement Bureau are excessive in view of the rural nature and sparse population characteristics of Petitioners' markets and in view of the monetary value of the HAC compliant handset itself (\$100-\$400). The Enforcement Bureau should be instructed to halt all enforcement activity relating to HAC compliance cases which concern the date upon which a carrier obtained HAC compliant handsets.

CTC Telecom, Inc. (“CTC”), Blanca Telephone Company (“Blanca”), and Farmers Cellular Telephone, Inc. (“FCTI”), by their attorney, on behalf of themselves and the other Tier III carriers treated as class by the Commission in the Commission’s February 27, 2008, *Memorandum Opinion and Order* (FCC 08-67) (collectively, “Petitioners”) hereby provide comments regarding the HAC waiver denial petitions for reconsideration discussed in the *Public Notice*, DA 08-1087 (released May 7, 2008) (“*Public Notice*”). In support whereof, the following is respectfully submitted:

#### **A. Background**

1) With all due respect, the Commission’s handling of the HAC waiver requests has been procedurally irregular. Petitioners filed HAC compliance status reports in the captioned docket for several years. To counsel’s knowledge the Commission did not place a single one of those reports on a public notice for public comment. To counsel’s knowledge, Petitioners’ various waiver requests were not placed on public notice for comment. The waiver requests did not request the commencement of a rule making proceeding,<sup>1</sup> the Commission never announced that it was opening or reopening a rule making proceeding, and there was no notice that the rule making proceeding in which the final HAC rules were adopted was ongoing.<sup>2</sup> The waiver requests sought

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<sup>1</sup> Action on a rule waiver request does not constitute action in a rulemaking proceeding. *See In the Matter of Disposition of Down Payment and Pending Applications by Certain Winning Bidders in Auction No. 35/Requests for Refunds of Down Payments Made in Auction No. 35*, 17 FCC Rcd 23354 ¶ 19 (FCC 2002) (“The fact that a decision to waive one of our rules is necessarily preceded by consideration of the rule’s effect does not transform the decision making process into a rule making proceeding.”).

<sup>2</sup> Docket WT 01-309 was left open for the filing of reports and other compliance issues regarding the final rules which were adopted in the proceeding. *See Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones*, 18 FCC Rcd. 16753 ¶ 90 (FCC 2003).

exemption from the HAC rules which were already final and they requested extensions of time until HAC compliant handsets could be obtained from distributors.

**B. There Was No Notice That A Waiver Opposition Was Filed**

2) As noted by another petitioner an *ex parte*, jointly filed *Consolidated Opposition* was filed against Petitioners' waiver requests on November 6, 2006.<sup>3</sup> See Uintah Basin Electric Telecommunications' *Petition for Reconsideration*, filed March 28, 2008, at 11. Not only was the *Consolidated Opposition* not served upon Petitioners, the Commission did not issue a public notice announcing the filing of the *Consolidated Opposition* nor did the Commission otherwise inform Petitioners that an *ex parte* objection to the HAC waiver requests had been filed.<sup>4</sup> The Commission failed to provide Petitioners with notice and an opportunity to address the *Consolidated Opposition* prior to the issuance of the February 27, 2008, *Memorandum Opinion and Order* (FCC 08-67) which denied their HAC waiver requests, an order which was predicated upon information presented in the *Consolidated Opposition*. See *Memorandum Opinion and*

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<sup>3</sup> Those filing the opposition did not become party to Petitioners' various waiver request proceedings because the opposition was not served upon the Petitioners. See 47 C.F.R. § 1.1202(d)(1); *Amendment of 47 C.F.R. Sec. 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, 12 FCC Rcd. 7348 ¶ 18 (FCC 1997) (service of an opposition is required to attain party status).

<sup>4</sup> Between November 6, 2006, when the *ex parte* objection was filed and February 27, 2008, when the *Memorandum Opinion and Order* (FCC 08-67) was released undersigned counsel had several e-mail exchanges and several telephone conversations with the Commission's staff concerning the various HAC waiver requests. While the staff, for instance, advised undersigned counsel that the waiver requests should not be withdrawn, and while the staff requested additional information regarding dates and FCC equipment identification numbers, the staff did not indicate that an opposition to the waiver requests had been filed. Clearly, Petitioners had not filed any type of reply to the *ex parte* opposition and the staff should have referred the matter to the General Counsel's office and undersigned counsel should have been served with a copy of the *Consolidated Opposition*. See 47 C.F.R. § 1.1212(c), (e). As required by 47 C.F.R. § 1.1214, a copy of the instant filing is being served upon the Commission's General Counsel to make the General Counsel's office aware of the facts relating to the *ex parte* violations.

*Order* (FCC 08-67) ¶ 6 (describing the relief sought in the *Consolidated Opposition*, relief which was substantially granted in FCC 08-67). The Commission should explain the public interest considerations which caused it to provide public notice of the filing of the various petitions for reconsideration, pleadings which were filed after the Commission issued the pertinent order, while it failed to provide notice to Petitioners about the filing of an opposition pleading filed before the Commission issued the pertinent order. In other words, the Commission must explain why Petitioners are not entitled to notice regarding the filing of opposition pleadings filed by others, but others are entitled to notice about pleadings filed by Petitioners. Moreover, the Commission must explain what it sees as new public interest considerations which have arisen which required the placement of the petitions for reconsideration on public notice while neither the quarterly HAC status reports nor the waiver requests were placed on public notice.

**C. The *Public Notice* Improperly Waives and Extends the Opposition Filing Deadline**

3) The subject petitions for reconsideration were timely filed by March 28, 2008. Oppositions to those petitions for reconsideration were due within 10 days of the date the petitions for reconsideration were filed. *See* 47 C.F.R. § 1.106(g).<sup>5</sup> After having already denied Petitioners' waiver requests based upon an *ex parte* opposition pleading upon which the Commission failed to provide any notice and opportunity for Petitioners to comment, the *Public Notice* waives the petition for reconsideration opposition filing deadline, without any discussion

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<sup>5</sup> As discussed above, there is no indication that there is any ongoing rule making proceeding. If the petitions for reconsideration were part of a rule making proceeding the Commission would have published notice of the filing of those petitions in the Federal Register, an action it did not take, and oppositions would have been due within 15 days of publication of the petitions in the Federal Register. 47 C.F.R. § 1.429(e),(f).

whatsoever,<sup>6</sup> and extends the petition for reconsideration opposition filing deadline from April 7, 2008, to May 22, 2008.<sup>7</sup> The Commission has not explained how and/or why it is able on the one hand waive the petition for reconsideration opposition filing deadline to Petitioners' detriment without any discussion whatsoever,<sup>8</sup> while on the other hand the Commission denied Petitioners' waiver requests without affording Petitioners an opportunity to comment upon the *ex parte* opposition pleading. Based upon these circumstances, it appears that the Commission has not proceeded fairly with Petitioners' waiver requests nor with Petitioners' reconsideration requests.<sup>9</sup>

#### **D. The Waiver Denials Are Predicated Upon Impermissible *Ex Parte* Communication**

4) Because the November 6, 2006, *Consolidated Opposition* was not served upon Petitioners and because the *Consolidated Opposition* sought to deny Petitioners' waiver requests, the *Consolidated Opposition* constituted multiple *ex parte* presentations which are clearly prohibited by the Commission's *ex parte* rules. 47 C.F.R. §§ 1.1202(a),(b)(1), 1.1208 & Note 1 to § 1.1208 (defining as restricted "all waiver proceedings (except for those directly associated

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<sup>6</sup> The Commission must discuss the public interest when it waives a rule. *Northeast Cellular Telephone Co. v. FCC*, 897 F2d 1164, 1166 (D.C. Cir. 1990).

<sup>7</sup> The *Public Notice* states that "comment" may be filed regarding the petitions for reconsideration and comments in opposition are not precluded.

<sup>8</sup> At a minimum the Commission's waiver of the opposition filing deadline imposes time delay in resolving the various petitions for reconsideration. In the case of CTC, the Enforcement Bureau has already issued a notice of apparent liability in the amount of \$30,000 (DA 08-535, released March 11, 2008) and in that case delay could result in monetary loss.

<sup>9</sup> Should the Commission determine that it erred in extending the opposition filing deadline, the Commission should, nevertheless, accept the instant comments. Accepting the instant comments, and taking the actions requested herein, would be remedial vis-a-vis the Commission's errors.



with tariff filings)").<sup>10</sup> The *Consolidated Opposition* is replete with references to Commission rules, case law, and history demonstrating the joint filers' intimate familiarity with the Commission's rules and procedures. The *Consolidated Opposition*, at 4, discusses that "the Commission must 'adhere strictly to its rules unless a party can demonstrate that 'in the public interest the rule should be waived.'" (Citation omitted). Despite urging the Commission to enforce its rules "strictly," the joint filers of the *Consolidated Opposition* did not seek waiver of the *ex parte* rules at the time they filed the *Consolidated Opposition* and the joint filers plainly engaged in "an evasion of FCC regulations." *Consolidated Opposition*, at 5.

5) The Commission plainly erred by granting the relief requested by the *ex parte* rule violators. The Commission is prohibited from considering *ex parte* communications in restricted proceedings. See 47 C.F.R. § 1.1212(d).<sup>11</sup> The *Memorandum Opinion and Order* (FCC 08-67) does not discuss that any *ex parte* communications were being made a part of the record nor were Petitioners informed that the *ex parte* communications would be made part of the record. That the relief granted to the *ex parte* rule violators included not only waiver denial, but also referral to the Enforcement Bureau and the issuance of notices of apparent liability highlights the extreme prejudice caused by the prohibited *ex parte* comments.

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<sup>10</sup> Given the fact that the *Consolidated Opposition* was not served upon Petitioners, and given the fact that the Commission did not provide notice to Petitioners regarding the filing of that opposition, it was not reasonably possible to bring the *ex parte* issue to the Commission's attention prior to the release of the *Memorandum Opinion and Order* (FCC 08-67).

<sup>11</sup> 47 C.F.R. § 1.1212(d) provides that:

Prohibited written *ex parte* presentations and all documentation relating to prohibited written and oral *ex parte* presentations shall be placed in a public file which shall be associated with but not made part of the record of the proceeding to which the presentations pertain. Such materials may be considered in determining the merits of a restricted proceeding only if they are made part of the record and the parties are so informed.

6) The disparate manner in which the Commission treated the joint filers of the *Consolidated Opposition* who clearly violated the *ex parte* rules to Petitioners' prejudice, and Petitioners who sought HAC waivers in the same manner as numerous other companies, is jaw-dropping.<sup>12</sup> What is sauce for the goose is gravy for the gander. The Commission must either 1) determine, in light of these multiple *ex parte* violations, whether sanctions against the two filers of the *Consolidated Opposition*, and/or the law firm which authored the *Consolidated Opposition*, are appropriate; or 2) explain why the Commission's rules are being applied strictly against Petitioners, but not against the joint filers given the fact that the Commission has waived rules for the benefit of the joint filers of the *Consolidated Opposition* without discussion of how that waiver serves the public interest.

**E. The *Consolidated Opposition* Filed Against the Waiver Requests Was Untimely**

7) Not only does the *Consolidated Opposition* constitute a series of *ex parte* violations of monumental proportions, the *Consolidated Opposition* was untimely filed with regard to the HAC rule waiver request filed by CTC, FCTI, and Blanca. These three Petitioners filed their waiver requests on September 18, 2006.<sup>13</sup> 47 C.F.R. § 1.45(b) required that the *Consolidated Opposition* be filed by Thursday September 28, 2006. However, the *Consolidated Opposition* was not filed until November 6, 2006. The *Consolidated Opposition* does not ask for a waiver of

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<sup>12</sup> As discussed in Petitioners' *Petition for Reconsideration*, the Commission announced a drop-dead, already lapsed HAC compliance deadline rule on the fly in the *Memorandum Opinion and Order* (FCC 08-67) and applied it against Petitioners. At the same time, the Commission ignored its long standing *ex parte* rules and the obvious violation of those rules -- the Commission did not even reference the *ex parte* rules in the *Memorandum Opinion and Order* (FCC 08-67). The inequity in the Commission's handling of this matter is palpable.

<sup>13</sup> Examination of Appendix C of the *Memorandum Opinion and Order* (FCC 08-67) reveals that the *Consolidated Opposition* was late filed with regard to a substantial majority of the waiver requests which were filed.

the opposition filing deadline nor does it provide a good cause justification for its untimeliness. The Commission's practice is to ignore untimely filed oppositions even if they are only several days late; in the instant case the *Consolidated Opposition* was several weeks late. See e.g., *Clifford Stanton Heinz Trust d/b/a CSH Cellular*, 11 FCC Rcd. 5354 (WTB 1996) (the Commission "strictly applies" a good cause standard to untimely opposition pleadings) (citations omitted); see also *Birach Broadcasting Corporation*, 23 FCC Rcd. 3141 ¶¶ 6-7 (FCC 2008) (potential opposition filers must seek extensions of time to file oppositions beyond the established deadline); *Fatima Response, Inc., Assignor and Dennis Michael Crepps d/b/a Big Tree Communications, Assignee; For Assignment of the Construction Permit for Station KZRO(FM), Dunsmuir, CA*, 14 FCC Rcd. 18543 n. 2 (FCC 1999) (opposition filed late and without justification is dismissed).

8) Despite the obvious untimeliness of the *Consolidated Opposition*, the *Memorandum Opinion and Order* (FCC 08-67) grants the relief sought by the joint filers of the *Consolidated Opposition* without a single word of discussion regarding the lateness of the *Consolidated Opposition*.<sup>14</sup> Thus, the Commission once again ignored its rules for the benefit of the third party rule violators. The Commission must discuss why it is ignoring its rules for the benefit of the joint filers of the *Consolidated Opposition* in light of the high standard it imposed upon Petitioners to obtain waiver of the HAC compliance rules. It appears that the Commission is treating inequally the various entities which are appearing before for it to obtain relief.

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<sup>14</sup> Given the fact that the *Consolidated Opposition* was not served upon Petitioners, and given the fact that the Commission did not provide notice to Petitioners regarding the filing of that opposition, it was not reasonably possible to bring the untimeliness of the opposition to the Commission's attention prior to the release of the *Memorandum Opinion and Order* (FCC 08-67).

## F. The Joint Filers Lack Standing To Contest the Waiver Requests

9) The Commission processed the *Consolidated Opposition* without conducting the standing analysis required by 47 U.S.C. § 411(a).<sup>15</sup> While the standing required before the Commission is not as stringent as that required to participate in Article III judicial proceedings, the Commission requires that an objector must “show a sufficient connection to the challenged action to establish that it would be injured by that action.” *In the Matter of Disposition of Down Payment and Pending Applications by Certain Winning Bidders in Auction No. 35/Requests for Refunds of Down Payments Made in Auction No. 35*, 17 FCC Rcd 23354 ¶ 19 (FCC 2002).

10) The *Consolidated Opposition* makes no showing that the joint filers of the *Consolidated Opposition* would be harmed by grant of any of Petitioners’ HAC waiver requests.<sup>16</sup> The interest of the joint filers of the *Consolidated Opposition* in the general enforcement of the Commission’s rules, or in the precedential effect a waiver decision might have, is insufficient to establish standing to protest the waiver relief sought by Petitioners.<sup>17</sup> While the joint filers

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<sup>15</sup> 47 U.S.C. § 411(a) provides that:

In any proceeding for the enforcement of the provisions of this Act, whether such proceeding be instituted before the Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the charge, regulation or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

<sup>16</sup> Given the fact that the *Consolidated Opposition* was not served upon Petitioners, and given the fact that the Commission did not provide notice to Petitioners regarding the filing of the *Consolidated Opposition*, it was not reasonably possible to bring the standing issue to the Commission’s attention prior to the release of the *Memorandum Opinion and Order* (FCC 08-67).

<sup>17</sup> For instance, the *Consolidated Opposition*, at 12, states that “Given the level of performance of other wireless carriers, as well as the more limited requests made by the short-term and medium-term Petitioners in this proceeding, there is no justification for allowing these Petitioners to

recognize that the Commission needs to look to the marketplace to determine waiver issues, *Consolidated Opposition*, at 7, the joint filers utterly fail to demonstrate that a HAC waiver grant in any of Petitioners' markets would injure the joint filers in any manner whatsoever. Despite the complete absence of alleged injury to the joint filers, the Commission granted the relief sought by the joint filers as summarized in the *Memorandum Opinion and Order* (FCC 08-67) ¶ 6.

11) Moreover, the joint parties are not themselves hearing impaired persons, or equipment suppliers to Petitioners, or purchasers or potential purchasers of handsets from Petitioners, nor does the *Consolidated Opposition* describe any other type of relationship which the joint filers have with Petitioners.<sup>18</sup> The joint filers are representational associations; one is an advocacy group, the other is an organization representing people with hearing loss. *Consolidated Opposition*, at 2-3. Well established Commission policy precludes claims based upon third-party standing. See e.g., *Instapage Network Ltd.'s Informal Request for Retroactive Bidding Credits*, 19 FCC Rcd 20356 ¶ 10 (WTB 2004) ("a party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"); see also *The Pikes Peak Broadcasting Company For Renewal of License for Station KRDO-TV Colorado Springs, Colorado*, 12 FCC Rcd. 4626 ¶ 6 (FCC 1997) (an association's standing to object is established when one of the association's members certifies that it resides in the relevant market area). Moreover, the *Consolidated Opposition* fails to discuss any hindrance which precluded any of the joint filers' members from protecting their own interests by objecting

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evade their obligations." Rule compliance concerns, standing alone, does not support standing to protest a request for relief from the rules.

<sup>18</sup> One of the joint filers notes that it has no local officers in Colorado (Blanca), Alabama (FCTI), or Idaho (CTC), much less local offices within Petitioners' licensed service areas. *Consolidated Opposition*, n. 2. The other joint filer does not disclose where its office is located.

personally to a waiver request submitted by a carrier within the market area where they reside. There is absolutely no support for the implicit conclusion contained in the *Memorandum Opinion and Order* (FCC 08-67) that the joint filers are proper third-party protesters.

#### **G. The Commission Cannot Establish Base Forfeitures Absent A Rule Making**

12) Uintah Basin Electric Telecommunications' *Petition for Reconsideration*, at 5, filed March 28, 2008, raises the issue of whether the HAC compliance matter should have been referred to the Enforcement Bureau. The *Memorandum Opinion and Order* (FCC 08-67) provides no direction to the Enforcement Bureau regarding how forfeiture issues should be handled. Lacking any direction whatsoever has caused the Enforcement Bureau to take a "one size fits all" approach to HAC enforcement proceedings. The Enforcement Bureau's HAC enforcement actions are improper.

13) For instance, the Enforcement Bureau has proposed a "base forfeiture amount of \$15,000 per handset" for each of the HAC handsets which CTC did not have in stock as of September 18, 2006, for a total forfeiture of \$30,000. *Notice of Apparent Liability for Forfeiture* (DA 08-535), ¶¶ 12-13. The *Notice of Apparent Liability for Forfeiture* (DA 08-535), ¶ 10, recites that there is no base forfeiture amount specified by the Commission for a carrier's inability to obtain HAC compliant handsets.<sup>19</sup> The *Notice of Apparent Liability for Forfeiture* (DA 08-

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<sup>19</sup> Because there was no prior notice that forfeitures would be issued in cases where carriers were unable to obtain handsets from distributors through no fault of their own, the lack of a defined forfeiture amount in the rules is a serious problem regarding the Enforcement Bureau's base forfeiture approach. As discussed in the *Petition for Reconsideration*, ¶ 5, "case law is clear that when the Commission denies a Federal benefit 'full and explicit' prior notice of the requirement must be provided to the applicant seeking the Federal benefit. *Salazar v. FCC*, 778 F.2d 869, 871-72 (D.C.Cir. 1985)." There was no prior notice that Petitioners would not be able to rely upon a circumstance beyond their control in seeking a rule waiver and there was no prior notice that the penalty would equal, for instance and as discussed below, the value of the carrier's spectrum.

535), ¶ 10, then recites that the “Commission retains the discretion, moreover, to depart from the Forfeiture Policy Statement and issue forfeitures on a case-by-case basis, under its general forfeiture authority contained in Section 503 of the Act.” However, the Enforcement Bureau is not proceeding on a “case by case” basis because the Enforcement Bureau has adopted, in its own words, a “base forfeiture amount of \$15,000 per handset” and it is applying that amount, without substantial deviation, to the HAC compliance cases which come before it. The Enforcement Bureau has effectively adopted a rule of general applicability in the absence of the rule making proceeding required by the APA.

14) The Enforcement Bureau’s plain statement that “we note that in a recent decision, a base forfeiture amount of \$15,000 per handset was established for violations of the hearing aid compatibility handset requirements,” *Notice of Apparent Liability for Forfeiture* (DA 08-535), ¶ 12 & n. 38, citing its own base forfeiture creation in *South Canaan Cellular Communications Company, L.P., Notice of Apparent Liability for Forfeiture*, 23 FCC Rcd. 20, 24-25 (Enf. Bur., Spectrum Enf. Div. 2008), cannot be reconciled with the Enforcement Bureau’s claim that it is departing from the Forfeiture Policy Statement on a case by case basis. The Enforcement Bureau has plainly determined that as a class, HAC compliance cases will be processed with regard to a “base forfeiture amount.” The Enforcement Bureau is applying the base forfeiture amount across the board; it is not determining forfeitures on a case-by-case basis.<sup>20</sup> *South Canaan* was released

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<sup>20</sup> In addition to *CTC Telecom, Inc.* and *South Canaan*, it appears that the Enforcement Bureau has always applied the base forfeiture it has devised without regard to the facts of a particular case. See *Iowa Wireless Services, LLC dba i wireless*, ¶ 12 (DA 08-610, released March 21, 2008), see *South Slope Cooperative Telephone Company d/b/a South Slope Wireless*, ¶ 11 (DA 08-603, released March 20, 2008); *SLO Cellular, Inc. d/b/a Cellular One of San Luis Obispo*, ¶ 14 (DA 08-555, released March 13, 2008); *Epic Touch Company, Inc.*, ¶ 11 (DA 08-462, released February 28, 2008); *AST Telecom, LLC d/b/a Blue Sky Communications*, ¶ 11 (DA 08-463, released February 27, 2008); *Cable & Communications Corporation dba Mid-Rivers Cellular*, ¶ 11 (DA 08-182, released

on January 3, 2008, nearly two months before the Commission released *Memorandum Opinion and Order* (08-67) and referred Petitioners to the Enforcement Bureau, absent any instruction to the contrary from the Commissioners, it must be concluded that the Commission approves of the Enforcement Bureau's adoption of a base forfeiture amount despite the fact that no rule making proceeding was conducted.

15) The Commission's adoption and application of a base forfeiture for HAC violations without first conducting a rule making proceeding would be troubling enough standing alone. However, the court of appeals has already directed that the Commission may not impose standardized forfeitures without first conducting a rule making proceeding. *See USTA v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994) (the APA requires the Commission to conduct a notice and comment rule making proceeding before adopting standardized forfeiture amounts). The Commission's unexplained and unauthorized repudiation of the appellate court's order requiring that standardized forfeitures can be adopted only after notice and comment rule making renders the enforcement referral, and the Enforcement Bureau's HAC compliance actions, void. The Commission should explain why it is subjecting small businesses to the crucible of enforcement penalties the appeals court has already determined are illegal. Plainly stated, the Commission's HAC enforcement efforts epitomize arbitrariness and capriciousness and the Commission must desist immediately; extraordinary appellate relief would seem a reasonable avenue under the circumstances.<sup>21</sup>

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February 11, 2008).

<sup>21</sup> Given the Commissioners' acceptance of the manner in which the Enforcement Division is handling HAC compliance cases, the issue is ripe for appellate review regardless of what level of the Commission issues a forfeiture order. Moreover, because the Commission has established a base forfeiture of \$15,000 per handset, any upward deviation from that amount would appear punitive.



## **H. There Was No Regulatory Flexibility Act Analysis of the Base Forfeiture**

16) The Commission should explain how the Enforcement Bureau's base forfeiture rule adoption promotes the interests of small businesses, such as CTC, which serve remote, sparsely populated areas of the country. The explanation should include a discussion of the Enforcement Bureau's failure to comply with the Regulatory Flexibility Act. In adopting the base forfeiture of \$15,000 per handset the Enforcement Bureau not only failed to comply with the requirements of the APA, it failed to comply with the Regulatory Flexibility Act, 5 U.S.C. §§ 603 & 604, which requires, *inter alia*, the collection and consideration of information relating to the impact of the base forfeiture amount on small businesses and the consideration of alternatives to the base forfeiture amount. As discussed below, the Enforcement Bureau's base forfeiture amount is excessive in rural areas. Funds used to pay excessive fines are not available to provide services in economically disadvantaged rural areas. The public interest in assessing a \$15,000 forfeiture for a carrier's failure to have on hand a \$100-\$400 HAC compliant handset which no one has requested is not apparent at first blush or otherwise and the base forfeiture amount has not been justified by the Commission as required by the RFA.

17) The *Memorandum Opinion and Order* (FCC 08-67), ¶ 22, "find[s] it immaterial whether a carrier has actually received requests for hearing aid-compatible handsets, since the purpose of the hearing aid compatibility rules is to ensure that such handsets will be available in a timely manner when a customer needs them." In proposing a forfeiture against CTC the Enforcement Bureau wrote that "in adopting the hearing aid compatibility rules, the Commission underscored the strong and immediate need for such access, stressing that individuals with hearing impairments should not be denied the public safety and convenience benefits of digital wireless

telephony.” *Notice of Apparent Liability for Forfeiture* (DA 08-535) ¶ 11. “Access” cannot be an overriding concern, but “immaterial” to assessing carrier compliance. Given that no one was denied any access, “immediate” or otherwise, to a HAC compliant handset, it is irrational to find that it is “immaterial” that no one requested a HAC compliant handset from Petitioners. *Memorandum Opinion and Order* (FCC 08-67) ¶ 22. Assessing a \$15,000 per handset forfeiture to ensure access when no access was denied is irrational.<sup>22</sup> A Regulatory Flexibility analysis of the Commission’s base forfeiture would have considered 1) the relevance of whether the carrier had received any requests for HAC compliant handsets; 2) would have distinguished between situations in which a carrier had received a HAC handset order, but was unable to fill it, and situations in which the carrier received no HAC handset orders; 3) would have addressed what to do in situations in which a carrier was unable to obtain the HAC handsets from its distributors; and 4) would have provided advance notice of the penalty for failing to meet non-existent HAC handset demand.

18) The proposed forfeiture issued against CTC, coming after Petitioners had already reported HAC compliance, is not a forward looking tool to encourage compliance, it is a backward looking punitive measure imposed in a situation where there was absolutely no harm caused by Petitioners’ inability to obtain HAC compliant handsets; a circumstance which was beyond their control in any event. A Regulatory Flexibility Act analysis of the base forfeiture would consider that one alternative to the draconian “one size fits all” large base forfeiture

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<sup>22</sup> To be clear: the forfeiture proposed against CTC is premised upon CTC’s then apparent failure to have two HAC compliant handsets in stock in case someone might ask for one. Access to a HAC compliant handset was not denied to anyone and the proposed forfeiture exists because the Commission has imposed a previously unarticulated “what if” test in measuring HAC compliance. As discussed in the *Petition for Reconsideration*, it appears that CTC had one HAC compliant handset in stock prior to the September 18, 2006 deadline and the second one in early January 2007.

approach would be the grant of the HAC waiver requests, just as the Commission has granted numerous other HAC waiver requests. A properly conducted Regulatory Flexibility Act analysis would dismiss out of hand a suggestion that the Commission should impose large penalties upon small businesses predicated upon an untimely filed *ex parte* presentation filed by entities who lack standing to complain.

### **I. The Commission's Base Forfeiture Is Excessive**

19) The combined population of the area served by CTC is just over 10,000 persons and the proposed forfeiture amounts to approximately \$3 per person in CTC's licensed service area. The proposed forfeiture is excessive on its face.<sup>23</sup> Moreover, the proposed forfeiture is excessive when compared to the value of CTC's spectrum. In the Commission's recently concluded 700 MHz auction the combined bids for areas which include the Adams and Boise Counties CTC serves was \$4,258,000 for a total population of 1,240,944 persons – \$3.43 per person.<sup>24</sup> The proposed forfeiture issued against CTC seeks to impose a penalty which is nearly equal to the inferred market value of CTC's spectrum. Thirty thousand dollars is one thing in New York City, it is an entirely different thing in Cambridge, ID and the Enforcement Bureau's approach fails to recognize the difference. The Commission should explain how the Enforcement Bureau's approach, which penalizes CTC an amount equal to the value of its spectrum, serves the public

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<sup>23</sup> A proportional forfeiture for a HAC violation based upon the \$3 per person assessed against CTC for a licensee of spectrum located in, for example, BEA010–New York (population of over 25 million) would be over \$77 million -- capped at \$1.325 million by statute.

<sup>24</sup> WY-CMA389-B (\$58,000; 72,374 pops; 12 MHz); WY-CMA390-B (\$212,000; 18,818 pops; 12 MHz); WY-BEA150-A (\$3,268,000; 574,876 pops; 12 MHz); WY-BEA150-E (\$720,000; 574,876 pops; 6 MHz). Adams County is located in CMA389; Boise County is located in CMA390. CTC's system is a small area 10 MHz system and the best spectrum market value approximation is likely obtained by examining CMA markets rather than the larger BEA markets. The combined bids for Auction 73 700 MHz CMA spectrum was \$270,000 for 91,192 pops = \$2.96 per pop.

interest and is reasonable.

### **J. Conclusion**

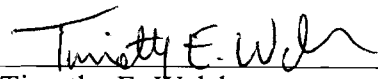
20) For reasons unknown, the Commission has granted, without a single word of discussion, various rule waivers which favor the joint filers of the *ex parte Consolidated Opposition* while it imposed an already lapsed HAC compliance deadline upon Petitioners even after they had reported HAC compliance. With all due respect, it appears that the Commission has not proceeded even handedly with regard to Petitioners compared to the joint filers of the *Consolidated Opposition* and, as discussed in the *Petition for Reconsideration*, the Commission has treated Petitioners differently compared to similarly situated carriers. There does not appear to be any rational basis for the disparate treatment accorded to Petitioners compared to other carriers or the *ex parte* joint filers and reconsideration is warranted.

WHEREFORE, in view of the information presented herein, it is respectfully submitted that the determination that Petitioners were not entitled to a waiver should be reconsidered.

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May 22, 2008

Respectfully Submitted,

  
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Timothy E. Welch

## CERTIFICATE OF SERVICE

I hereby certify that I have this 22 day of May 2008 mailed a copy of the forgoing *Comments Regarding Petitions for Reconsideration* by First Class United States Mail, postage prepaid, to the following:

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Washington, DC 20554

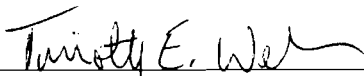
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